MOTION FILED

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No. 00-433

In The

# Supreme Court of the United States

WESTSIDE QUIK SHOP, INC., ET AL.,

*Petitioners,*

vs.

ROBERT M. STEWART, ET AL.,

*Respondents.*

**On Petition For Writ Of Certiorari To The Supreme Court Of The State Of South Carolina**

## MOTION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE SOUTH CAROLINA ASSOCIATION OF CONVENIENCE STORES

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## QUESTION PRESENTED

May a state, pursuant to its police power, take private property and destroy a previously legal business that is not a public nuisance without paying just compensation for the taking?

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE SOUTH CAROLINA ASSOCIATION OF CONVENIENCE STORES

The South Carolina Association of Convenience Stores respectfully petitions this Court for leave to file the annexed brief Amicus Curiae pursuant to Supreme Court Rule 37.2(b). Written consent of all the parties was sought pursuant to Supreme Court Rule 37.2(a). The Petitioners have given their consent to this Amicus brief. However, the Respondents have refused to consent to the filing of the Amicus brief.[1]

## IDENTITY AND INTEREST OF AMICUS CURIAE

The South Carolina Association of Convenience Stores is a non-profit South Carolina corporation formed for the purposes of representing the trade interests of convenience stores in South Carolina. The Association was founded in 1976. The Association has approximately 270 members. Convenience stores rely on revenue from video gaming and plan fiscally based upon such profits. The vast majority of convenience stores in South Carolina have video gaming machines. Of the 28,000 to 32,000 total machines licensed in South Carolina for 1997 to 1998, 9,000 to 10,000 video game machines were located in convenience stores. Consequently, the issues before the

[1] Copies of the request for consent have been filed with the Clerk of Court. Petitioner's consent has also been filed with the Clerk of Court.

Court are of extreme interest to all members of the Association, and a number of, if not all of the members of the Association, have been affected by the statute at issue.

Respectfully submitted by:

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## BRIEF AMICUS CURIAE OF THE SOUTH CAROLINA ASSOCIATION OF CONVENIENCE STORES[2]

The South Carolina Association of Convenience Stores respectfully submits this brief Amicus Curiae.

## IDENTITY AND INTEREST OF AMICUS CURIAE

The identities and interests of Amicus Curiae are set forth in the preceding motion and are adopted herein.

## OPINIONS BELOW AND JURISDICTION

Amicus hereby adopts Petitioner's description of the opinions below and jurisdictional statement.

## STATEMENT OF THE CASE

Amicus adopts Petitioner's statement of the case, and the statement of the case of Amicus Curiae of The South Carolina Coin Operator's Association, Inc.

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[2] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

## REASONS FOR GRANTING CERTIORARI

Private property shall not "be taken for public use, without just compensation." U.S. Const. Amend. V. The South Carolina Supreme Court in *Westside Quik Shop, Inc. v. Stewart*, No. 25758, 2000 Lexis 151 (S.C. June 21, 2000) eviscerated the protection accorded the video gaming industry under the Fifth Amendment's Takings Clause. Specifically, the court condoned the abrupt ban of video gaming by the South Carolina legislature without requiring just compensation under the Fifth Amendment. The petition for certiorari should be granted because the South Carolina Supreme Court has ignored this Court's precedent and established a dangerous rule that allows the legislature arbitrarily to define private property as contraband *per se*, thereby avoiding the Fifth Amendment's requirement of just compensation.

In 1922, Justice Holmes foresaw the danger that has now materialized in South Carolina: "The protection of private property in the Fifth Amendment pre-supposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation . . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Pennsylvania Coal Co. v. Mahon, et al.*, 260 U.S. 393, 415 (1922). The South Carolina legislature and Supreme Court have followed this "natural tendency" of further qualifying private property by serving up video gaming for the police power axe. South Carolina's regulation of video game machines has gone "too far" and must be recognized as a taking. *See id.*

Justice Holmes recognized that in "exceptional cases," like the blowing up of a house to stop a conflagration, the taking may not be compensable based upon preserving the public's health and welfare. *See id.* However, even in these cases, Justice Holmes warned of the exception swallowing the rule: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.* at 416.

Aside from the power of eminent domain, states routinely regulate private property under their police power. The degree to which a state may take private property under its police power without paying just compensation is the important Fifth Amendment issue before this Court. The South Carolina Supreme Court's decision in *Westside Quik Shop* represents an extreme trend toward eroding the Fifth Amendment's just compensation protection under the guise of the state's police power.

The extreme to which the South Carolina Supreme Court has gone to destroy video gaming without paying for it becomes evident when one examines the logic proposed in *Westside Quik Shop*. The court below began its discussion by declaring: "The forfeiture of contraband that comports with the Fourteenth Amendment's Due Process Clause is not a compensable taking under the Takings Clause of the Fifth Amendment." *Westside Quik Shop v. Stewart*, No. 25158, 2000 Lexis 151 at *8 (S.C. June 21, 2000). To support this proposition the court cited *Bennis v. Michigan*, 516 U.S. 442, 452 (1996). *Bennis*, however, stated a proposition that Justice Holmes had originally observed in *Mahon* – that in exceptional, public

nuisance cases, private property may be destroyed by the government without compensating the owner. In *Bennis*, a Michigan court ordered that an automobile be forfeited as a public nuisance because the owner engaged in sexual activity with a prostitute in the automobile. This Court affirmed. Thus, the South Carolina Supreme Court's linking of the Due Process Clause to the Takings Clause merely begs the question of whether video gaming is the type of activity that fits within those "exceptional cases" that justify the taking of private property under the state's police power without just compensation.

The court in *Westside Quik Shop* further referred to its opinion in *State v. 192 Coin-Operated Video Game Machines*, 525 S.E.2d 872 (S.C. 2000) to suggest that the forfeiture of video gaming machines in South Carolina accords with due process requirements. In that decision the court held that certain video game machines, declared illegal under Section 12-21-2710 of the South Carolina Code, were contraband *per se* and could be destroyed by the state, even though they were only being stored in a warehouse and were not operational. *See 192 Coin-Operated Video Game Machines*, 525 S.E.2d at 879. The court further held that due process would not be violated because the magistrate's examination of the seized machines under section 12-21-2712 included an opportunity for the owner of the machines to be heard concerning their legality. *Id.* at 883.

However, the court's holding in *192 Coin-Operated Video Game Machines* provides no guidance on whether the South Carolina legislature can abruptly declare lawfully acquired video game machines contraband *per se*, and avoid the just compensation requirement of the Fifth Amendment. Video game machines have historically been

legal in South Carolina and have supported a prosperous industry employing thousands of workers. Convenience stores all over the state have relied on the profits produced from video gaming and, in turn, created new jobs and planned their future with video gaming. Such investment and planning was not entered into lightly but was developed carefully as the legislature and the courts consistently reinforced the legality of the video gaming industry in South Carolina. Consequently, when the South Carolina Supreme Court abruptly declared video game machines contraband as of July 1, 2000, convenience store owners found their businesses and employees in apocalyptic flux. There was significant loss of private property in an industry that was, until recently, a viable and accepted force in the community. Against this backdrop, the Fifth Amendment requires South Carolina to pay just compensation for the taking.

## I. The Legislature's Power To Regulate Gambling Does Not Support The Taking Of Video Game Machines Without Just Compensation.

In *Westside Quik Shop*, the court stated: "Gaming devices in general have long been recognized as legitimately within the police power of the State to control or take by forfeiture, *Lawton v. Steele*, 152 U.S. 133, 136 (1894), . . . ." *Westside Quik Shop*, 2000 Lexis 151 at *9. The court's reliance upon *Lawton v. Steele* illustrates the fallacy of the court's logic and the danger in its holding. In *Lawton* the United States Supreme Court made the unremarkable observation that "[m]any articles, such, for instance, as cards, dice, and other articles used for gambling purposes, are perfectly harmless in themselves, but

may become nuisances by being put to an illegal use, and in such cases fall within the ban of the law and may be summarily destroyed." *Lawton*, 152 U.S. at 142. The actual controversy in *Lawton* concerned the taking and destruction of fishing nets for the purpose of preserving wildlife in New York. The Court's analogy to instruments of gambling was merely an example of the government taking contraband derivative of the underlying nuisance.[3] Its decision was based upon the general maxim that a state's police power was broadly defined to protect the public safety, health, and morals. *See Lawton*, 152 U.S. at 136.

However, the Court in *Lawton* was emphatic that "[t]he legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." *Id.* at 137. The Court further noted that if a net that was not used in violation of the law was taken and destroyed, then the owner could institute an action to recover the net's value. *See id.* at 142.

*Lawton* provides no authority for the South Carolina legislature to suddenly declare video game machines contraband *per se* and avoid paying just compensation where video gaming was historically accepted in South Carolina prior to the judicial activation of sections 12-21-2710 and 2712. *Lawton* was a clear public nuisance case that recognized the state's power to declare certain property contraband when used for a purpose that constituted a

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[3] "Derivative contraband" are items that are only illegal based upon use. "Contraband *per se*", on the other hand, is property inherently unlawful to possess. *See* Luttrell, *Video Poker: A Survey of Recent Developments Surrounding the Legal and Moral Debate*, 51 S.C. L. Rev. 1065 (2000).

nuisance. The ban of video game machines falls outside the realm of clear public nuisance. Moreover, there has been no legislative or judicial finding as to the public need for destroying the video gaming industry. Instead, the video gaming issue represents a slight sway of public opinion that, less than a year before, appeared to be well in favor of video gaming. In this sense, the progressive words of Justice Holmes are germane: "The truth seems to me to be that, **subject to compensation when compensation is due**, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it." *Tyson & Brother v. Banton*, 273 U.S. 418, 446 (1927) (Holmes, J. dissenting) (emphasis added). In this case, compensation is due under the Fifth Amendment.

## II. The History Of Video Gaming Regulation In South Carolina Does Not Justify Abruptly Declaring Video Game Machines Contraband *Per Se* Without Paying Just Compensation.

The South Carolina Supreme Court declared in *Westside Quik Shop*: "we have consistently deferred to the legislature's determination of what gaming devices must be sacrificed for the public welfare. *See, e.g., Johnson v. Collins.*" *Westside Quik Shop*, 2000 Lexis 151 at *10. Despite this conclusory statement, the state may not destroy private property rights and escape the obligation of just compensation by the circular reasoning that the private right was invalidated by the regulation and therefore never existed. *See Devines v. Maier*, 665 F.2d 128 (7th Cir. 1981). In *Johnson v. Collins*, 508 S.E.2d 575 (S.C. 1998), the court did defer to the legislature but declared that video game machines were not prohibited "lotteries" within the meaning of the South Carolina constitution; thus, video

gaming was legal.[4] The court carefully illustrated that the South Carolina Constitution and related caselaw had never prohibited games of chance or gambling *per se*. *See Johnson*, 508 S.E.2d at 577-78. "The framers of our Constitution clearly distinguished between 'lottery' and 'gambling or betting on games of chance.' " *Id.* at 578. As aptly stated in one of the seminal South Carolina lottery cases, "the constitutional and legislative prohibition is directed at a special type of vice in the fields of advertising and gift enterprises – the type that has come to be denominated both in the law and in common parlance by the word lottery." *Darlington Theatres, Inc. v. Coker*, 2 S.E.2d 782, 786 (S.C. 1939).

Thus, as recently as 1998, the South Carolina Supreme Court in *Johnson v. Collins* reaffirmed the historic rule in South Carolina that gaming devices were generally legal, except for lotteries. It is curious, then, that the court in *Westside Quik Shop* would cite *Johnson v. Collins* to support its holding that video game machines could be sacrificed without just compensation. *Johnson v. Collins*, instead, demonstrates that throughout South Carolina history lotteries were the only type of gambling consistently prohibited by law.

The South Carolina Supreme Court has suggested in a separate decision that the video gaming industry "assumed the risk" by purchasing video poker machines when gambling was such a highly debated issue in South Carolina. *See Mibbs v. South Carolina Dep't of Revenue*, 524

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[4] Lotteries have only been illegal in South Carolina since the constitutional amendment of 1868.

S.E.2d 626, 627 (S.C. 1999). Despite this view, the legality of video gaming has repeatedly been affirmed. For instance, in 1994, a series of county-by-county referenda revealed a high level of public support for video gaming. *See* Luttrell, *Video Poker: A Survey of Recent Developments Surrounding the Legal and Moral Debate*, 51 S.C. L. Rev. 1065, 1083-84 (2000). In 1998, the court in *Johnson v. Collins* further reinforced the legitimacy of video gaming.

It was not until October 1999 that the abrupt and unforeseen destruction of video gaming came to pass in South Carolina. Before this occurrence, the industry, in reliance upon the historic legality and viability of video gaming, built a business that accumulated annual revenue of $1.45 billion and employed 57,000 workers.[5] *See*, Luttrell, 51 S.C. L. Rev. at 1065, n.3. This was not a clandestine industry on the fringe of public morality. Moreover, video gaming certainly was not a nuisance like prostitution or drug trafficking. Rather, it was a well-established industry that had its entire way of life pulled out from under it by sudden legislative enactment. The owners and operators of video game machines are entitled to be compensated for their losses under the Fifth Amendment.

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[5] In 1998, the average payout per machine was $62,270. The average gross profit was $24,993 per machine. *See South Carolina Department of Revenue's Summary of Video Game Machine Quarterly Reports for the 4th Quarter 1998, October 1 – December 31, 1998 and for the Calendar Year 1998.*

## CONCLUSION

For the foregoing reasons, Amicus respectfully requests that this Court grant the Petition for Writ of Certiorari.

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